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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

March 30, 2001

ORIGINAL

Ms. Magalie Roman Salas
Office of the Secretary
Federal Communications Commission
The Portals – TW-A325
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: **ET Docket No. 98-206/ RM-9147; RM 9245**
EX PARTE

Dear Ms. Salas:

On behalf of the Satellite Broadcasting & Communications Association, DIRECTV, Inc. and EchoStar Satellite Corporation (collectively, the "DBS Operators") this letter will register the DBS Operators' concerns about (i) the lack of information surrounding the testing currently being conducted by the MITRE Corporation in connection with the above-captioned proceeding, (ii) MITRE's and the FCC's decision not to disclose to the parties even the MITRE test plan and (iii) the scope of MITRE's "charter" in conducting its tests. This letter also will correct certain misinformation regarding the DBS Operators' cooperation with the testing, which has appeared in the press and which has been allowed to take hold precisely because of the lack of transparency.

Congress has required the Commission to select an independent organization and commission it to conduct a test of the interference created by a proposed new terrestrial service that seeks to use the same frequencies currently used by Direct Broadcast Satellite ("DBS") systems. *See* Section 1012, the "Prevention of Interference to Direct Broadcast Satellite Services" provision of Pub. L. No. 106-553. The Commission contracted with MITRE Corporation to conduct this test. Shortly thereafter, MITRE and the Commission staff convened a meeting of all interested parties at MITRE's Tysons Corner headquarters on January 24, 2001. At that meeting, the DBS Operators requested that MITRE provide the parties with a test plan. The MITRE representative chairing the meeting responded that whether or not MITRE would do this was "TBD" (to be determined), and it depended on the FCC's instructions.

At the January 24 meeting, the DBS Operators expressed their strongly held view that the testing process ought to be transparent. Transparency is essential for the process to command confidence, and, if possible, consensus among all interested parties as to the fundamentals of the

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methodology. Since the January 24 meeting, the DBS Operators have repeatedly expressed the view that transparency is of the essence. And to achieve any meaningful transparency, a test plan is the minimum, in terms of type as well as quantity, of information that must be provided. Generally, while the DBS Operators were able to obtain a meeting with MITRE representatives at MITRE's Bedford, Massachusetts facility to provide them with DBS equipment and with the DBS Operators' views on the question of spectrum sharing, the DBS Operators have received little or no information on MITRE's methods and tests.

Specifically, for a period of two months after the January 24 meeting, the DBS Operators were left to infer from MITRE's silence that MITRE (or the FCC) had decided against disclosure or publication of the test plan. This inference was not confirmed until March 23, 2000, two months after the meeting and at a time when MITRE must already have conducted much of its testing anyway. On that date, the parties received a letter from the Commission stating that a test plan will not become available. This decision to withhold information is the reverse of transparency and hardly inspires confidence in the testing process.

Confidence in the testing process is further degraded by the Commission's rationale for withholding information. The Commission's March 23, 2000 letter and attached Statement of Work indicate that MITRE is to provide to the Commission a "work plan," "progress reports" and a "final report." *See* Statement of Work, Technical Demonstration or Analysis of Potential Harmful Interference to DBS From Proposed Terrestrial Services in the 12.2-12.7 GHz Band (Jan. 19, 2001), at 2. The March 23, 2000 letter further states that these documents will not be publicly available pursuant to Section 0.457 of the Commission's Rules. Although it is not clear which subsection of Rule 0.457 the Commission relies upon, the information is presumably being withheld in accordance with Subsection (e) of Rule 0.457, which provides that "interagency and intra-agency memorandums [sic] and letters" and "work papers" will not be made available for public inspection. Reliance on this ground for withholding information produced by MITRE appears to be inconsistent with Congress's call for independent tests. Nor does it appear appropriate to view MITRE as another government agency or synonymous with the Commission for the purposes of this testing.

Concern regarding transparency arises in connection with other questions raised by the DBS Operators. With respect to the question of field testing for example, the MITRE representative intimated at the January 24 meeting that MITRE had tentatively decided not to conduct any field testing. And to date, the DBS Operators have received absolutely no information about any field testing. The lack of transparency in the testing process has resulted in DBS Operators having no idea whether field tests are being conducted, and importantly, whether such tests are being conducted properly. For this reason, the DBS Operators request an opportunity to review and comment upon any field test results.

Moreover, the lack of transparency has also led to a deep concern that the focus of the tests has strayed into areas well beyond what was mandated by Congress. Congress mandated that tests be conducted to measure the interference that occurs when the proposed new terrestrial service operates on the same frequencies used by DBS. Accordingly, MITRE was tasked to

make interference measurements. Yet some of the questions that MITRE has directed to the DBS Operators lead the DBS Operators to conclude that the tests are focused on the subject of mitigation of interference and the question of what interference is "harmful." For example, on March 23, 2001, MITRE submitted a document styled "Fourth Set of Questions for the DBS Industry from the MITRE Corporation." This document posed a single question:

1. Various measures of service degradation have been discussed in the record. These include relative (percentage) increase in unavailability, absolute increase in unavailability, absolute unavailability, average unavailability, and C/I ratios. Please provide any information that would correlate any of these measures to DBS customer dissatisfaction or DBS market impact? Either quantitative or qualitative information would be helpful.

Testing mitigation techniques instead of interference is contrary to the statute and calls the relevance of the tests into question. Likewise, determinations such as "correlat[ing]" measures of service degradation to "customer dissatisfaction or DBS market impact" go to the *criterion* of harmful interference (a question distinct from measuring how much interference is caused), which belongs to the Commission, and cannot be delegated to an independent testing entity.

The lack of transparency surrounding MITRE's testing is far from an academic concern, as it has already bred significant opportunities for distortion and misinformation. Specifically, the trade press has widely reported that the MITRE testing has been delayed, and that the delay has been attributed to the DBS Operators' lack of cooperation. *See, e.g., Telecommunications Reports*, February 26, 2001 (reporting statements of Northpoint officials blaming the DBS industry for delay in completing congressionally mandated testing of Northpoint's proposed system).

The rumor spread by Northpoint is false. The DBS Operators promptly cooperated with MITRE, and have provided all the equipment that MITRE needs to test interference into the DBS satellite signals. In fact, when counsel for EchoStar was contacted by the FCC on Friday, February 2, 2001 and advised that MITRE needed EchoStar's equipment no later than the following week, EchoStar had already shipped that equipment by FedEx and it was delivered to MITRE on Monday, February 5, 2001. DIRECTV shipped its equipment in an equivalent expedited timeframe, and EchoStar and DIRECTV representatives traveled to Bedford, Massachusetts to help MITRE set up the equipment for testing.

Northpoint tries to connect its rumor with the truth by ignoring the DBS Operators' provision of equipment and stating instead that the DBS Operators have not provided MITRE with "bench transmitters" – devices that simulate satellite transmissions. This point is both misleading and irrelevant. If MITRE's testing is to be an accurate replication of real life conditions, where possible, MITRE must use actual satellite transmissions, not simulations, and MITRE has all the equipment necessary to test interference into actual transmissions. In addition, the DBS Operators in fact invited MITRE to visit the facilities housing the one bench transmitter that each of the two DBS companies possesses and to use that transmitter, if

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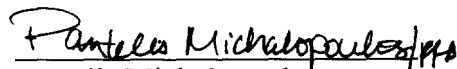
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necessary. The point here is that such an attempt at misinformation would not have been conceivable in an environment of full and transparent information about MITRE's testing.

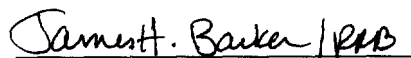
The Commission, as well as all concerned parties, should bear in mind that the potential for severe service disruptions for millions of DBS customers is what is at stake here. Therefore, the DBS Operators respectfully request that the Commission and MITRE give interested parties as much information as possible about the unfolding testing process.

In accordance with 47 C.F.R. § 1.1206, six copies of this letter are enclosed – two for each docket or RM file listed above.

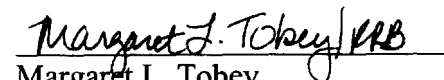
Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of March 2001 a true and correct copy of the foregoing was served via hand delivery or by first-class mail, postage pre-paid (indicated by *) upon the following:


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